

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2013-108924-001 DT
CR2014-150114-001 DT

08/17/2016

JUDGE M. SCOTT MCCOY

CLERK OF THE COURT
L. Mitchell
Deputy

STATE OF ARIZONA

KRISTIN LARISH

v.

FRANKLIN ARNETT CLIFTON (001)

MARIA L SCHAFFER
GREGORY J NVAZO
KYLE KINKEAD

CAPITAL CASE MANAGER

UNDER ADVISEMENT RULING

Before the Court are several motions in CR2013-108924-001 (the 2013 case) and others pertaining to CR2014-150114-001 (the 2014 case). Following evidentiary hearing and oral argument on August 12, 2016, the Court took these matters under advisement. Because a second trial in the 2013 case approaches, this minute entry addresses that case's issues first.

I. Background

The state charged Defendant in the 2013 case with Drive By Shooting and Aggravated Assault in connection with an alleged "road rage" incident in which Defendant fired a handgun from his truck, striking the victims' red automobile. Defendant, a Marine with combat experience then on reserve duty, maintained that his actions were justified because he feared for his life due to erratic driving of the red automobile.

Though the Court had ruled Defendant's status as a Marine was inadmissible, Defendant and his then attorney impermissibly and gratuitously injected Defendant's military service and firearms training into the trial. For example, when (needlessly) asked why he did not discard the firearm

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at issue, Defendant volunteered that: “I did not believe I did anything wrong . . . it was a gift from my master sergeant that I served with.”

The Court declared a mistrial on September 17, 2014, when the jury was unable to reach a verdict on any count. Roughly one month later, the State charged Defendant in the 2014 case with First Degree Murder, Attempted First Degree Murder, Sexual Assault and other felony charges against in connection with an incident occurring on October 17, 2014. The State has since noticed its intent to seek the death penalty in the 2014 case.

II. Motions Pending in the 2013 Case

Various motions are now at issue in the 2013 case:

- 1. State’s Motion in Limine Re: Defendant’s Military Service and Alleged Mental Health Issues.** The State seeks to preclude any reference to Defendant’s military service and training, as well as his reported Post Traumatic Stress Disorder. Defendant’s response proffers four possible circumstances under which the relief the State seeks would be inappropriate. Response at 1-2.

The Court finds under Rule 403 that that the danger of undue prejudice to the State substantially outweighs the probative value of evidence concerning Defendant’s military service, his mental health, and his opinion that the person driving the other car was drunk. His firearms training could possibly be admissible, depending on the evidence at trial.

IT IS THEREFORE ORDERED granting the State’s Motion in Limine. Defendant may not introduce evidence, argue, or otherwise make the jury aware of Defendant’s military service, his reported mental health problems, or his opinion that the person driving the other car was drunk.

If, however, the evidence at trial raises an issue whether Defendant’s use of deadly force was reasonable in its scope, then defense counsel may seek permission in advance from the Court to introduce evidence concerning his proficiency with the firearm at issue (without reference to the source of that proficiency).

- 2. Defendant’s Motion to Exclude “Tire-Matching” Testimony (*Daubert*).** As the Court stated on the record during oral argument, the Court finds this motion mischaracterizes

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the expert opinions proffered by Detective John Merrell. *See* State's Response, Exh. B (Merrell's report).

Because Defendant testified at the first trial – contrary to his statement to the Glendale Police Department – that the victims' car came into contact with his truck and, further, that the collision resulted in a specific mark, the State has the right to offer expert testimony concerning whether a collision occurred and whether the mark Defendant pointed out could have been made in the manner he claimed.

IT IS THEREFORE ORDERED denying Defendant's Motion to Exclude "Tire Matching" Testimony, without prejudice to more specific defense objections at trial.

3. **State's Notice of Other Act Evidence; Defendant's Motion to Strike (Same); State's Supplemental Notice.** The State's has given notice of its intent, conditionally, to offer sanitized evidence from the 2014 case – *i.e.*, that Defendant shot two women a month after the mistrial in the 2013 case – and now claims he acted in self-defense on that occasion, too. The State's Supplemental Notice similarly seeks permission to introduce evidence of Defendant's recent fight in jail, a third incident in which he apparently maintains that he acted in self-defense.

The State theorizes that such acts are admissible for a permissible (non-character) purpose under Rule 404(b) to show Defendant's intent and to rebut his claim that he shot at the red car in self-defense.

Defendant's Motion to Strike understandably criticizes the timing of the State's initial notice, but in the exercise of its discretion, the Court will not strike the notice as untimely.

IT IS THEREFORE ORDERED denying Defendant's Motion to Strike.

Having so ruled, the Court acknowledges its concern that little time will be available to hold any necessary evidentiary hearings and otherwise comply with the dictates of *Terrazas*. The State maintains that any necessary hearings will be brief.

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The Court at oral argument also discussed its competing concerns that: i) to the extent the other acts evidence is admissible for a proper purpose, that Rule 403 may well militate against admission; and ii) it is difficult to assess the probative value of the proffered evidence:

- (a) without knowing details of Defendant's theory of this trial and,
- (b) in light of the Court's concern, notwithstanding current counsel's higher level of professionalism, that Defendant will volunteer impermissible evidence in the second trial.

After considering all the facts and circumstances,

IT IS ORDERED deferring ruling on the admissibility of the State's noticed other acts evidence.

Once defense counsel reveals Defendant's theory of this trial, or if Defendant testifies, the State may renew its request to offer other acts evidence. The Court will then assess whether compliance with *Terrazas* is practicable and, if so, rule on admissibility.

- 4. Defendant's Motion in Limine.** Defendant's motion (at 1-2) seeks to exclude six areas of evidence developed after the State learned that Defendant, when arrested in the 2014 case, had in his possession handwritten information (some of which was inaccurate) about the victims in the 2013 case, including dates of birth, a social security number, and possible street addresses.

The State argues that one of the six areas is admissible to show Defendant's consciousness of guilt in the 2013 case.

The Court finds that if, a month after the mistrial in the 2013 case, Defendant possessed personal information not readily available to the public for the victims of that case, such evidence is probative for a non-character purpose – *i.e.* Defendant's consciousness of guilt in the 2013 case. The Court further finds that the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice or other concerns under Rule 403.

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IT IS THEREFORE ORDERED denying in part Defendant's Motion in Limine to the extent set forth in the paragraph immediately above, subject to the State demonstrating by clear and convincing evidence (through evidentiary hearing or offer of proof) that Defendant did in fact possess victims' personal information.

IT IS FURTHER ORDERED granting Defendant's Motion in Limine in all other respects.

5. **Defendant's Motion to Suppress Statements and Request for Voluntariness Hearing.** Defendant spoke to Detective Darby of the Glendale Police Department after validly waiving his *Miranda* rights. For the first time, he now seeks exclusion of his statements as involuntary.

"Confessions are [to be excluded as] involuntary if the court, considering all the circumstances, determines that one of the following factors exists: (1) impermissible conduct by police, (2) coercive pressures not dispelled or (3) confession derived directly from a prior involuntary statement." *State v. Tapia*, 159 Ariz. 284, 288, 767 P.2d 5, 9 (1988) (citations omitted).

Having reviewed the video recorded statements at issue, and after considering all the facts and circumstances, the Court finds that the State has met its burden of showing that Defendant's statements were voluntary. The questioning was less than two hours in length, occurring during the late morning and early afternoon. Defendant was given appropriate breaks and endured no physical hardships. The detective's tactics were not impermissible or coercive, nor did Defendant's statements derive from an earlier involuntary statement.

IT IS THEREFORE ORDERED denying Defendant's Motion to Suppress Statements.

6. **Desserault Hearing.** Defendant also challenges his pretrial identification in a photographic lineup, contending that police used unduly suggestive procedures. Having reviewed the lineup, the video recording of the procedure, and after considering oral argument, the Court disagrees.

Due process "require[s] that any pretrial identification procedures [be] conducted in a manner that is fundamentally fair and secures the suspect's right to a fair trial." *State v. Rojo-Valenzuela*, 237 Ariz. 448, 450, ¶ 6, 352 P.3d 917, 919 (2015) (internal quotations

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and citations omitted). To determine whether such a procedure violates due process, the Court must consider “the totality of the circumstances.” *Id.* (citing *Dessureault*).

Here, police randomly placed Defendant’s recent photograph in an array of six subjects. The victim in short order eliminated all but two of the persons identified and, after some deliberation and without prompting, identified the Defendant as the person who shot at their automobile.

The Court finds the proceeding was not suggestive. And to the extent the procedure was in any way suggestive, Defendant’s due process rights are protected by his opportunity to cross examine the victim at trial.

IT IS THEREFORE ORDERED that the State may offer in evidence the pretrial identification of Defendant.

7. State’s Motion to Compel Defendant’s Phone Records in Possession of Defendant. Police seized Defendant’s cell phone when they arrested him in the 2014 case. The State obtained via search warrant the information from the phone for the month of October 2014 (the month of the incident in the 2014 case).

Recently, Defendant disclosed to the State as mitigation a redacted series of text messages occurring on October 14, 2014 between Defendant and his then attorney ostensibly showing both that counsel: (a) was encouraging Defendant to engage in misconduct in the retrial; and (b) sought payment from Defendant over and above the amount OPDS would pay counsel for the retrial. In doing so, Defendant expressly waived the attorney-client privilege over that conversation.

Defense disclosures also included a “User Dictionary” from Defendant’s cell appearing to indicate that Defendant on unspecified dates had searched for information about the victims in the 2013 case.

The State’s motion seeks an in camera review of:

- i. The redactions to the October 14, 2014 text messages between Defendant and then defense counsel, to ensure completeness of disclosure.
- ii. All phone records referring or relating to the victims’ names, pursuant to Rule 15.1(g).

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The Court finds in camera review by Judge Myers is appropriate in both instances.

Concerning the former, Judge Myers shall determine if all text communications between Defendant and Mr. Martinez on October 14, 2014 have been disclosed, consistent with Defendant's privilege waiver.

Concerning the latter, the Court finds pursuant to Rule 15.1(g) that the State has shown that it has a substantial need for material in the Defendant's possession to prepare both the 2013 and 2014 cases and that the State is unable to obtain the substantial equivalent thereof by other means.

IT IS THEREFORE ORDERED granting the State's Motion to Compel.